Temporary Employees May Tip the Scales - Thresholds of Labor and Employment Law

Introduction	Thresholds traditionally have special significance in labor and employment law. Many provisions of German labor and employment law intended to benefit small companies are applicable only if a company, or operation of a company, has a certain number of employees. Perhaps the best example of such a provision is § 23 of the German Wrongful Termination Act, according to which the key parts of this Act do not apply to operations which generally have ten (or, in old cases, five) or less employees. Another example is § 17 of the Wrongful Termination Act, which requires notice of mass layoffs only if an operation generally has more than 20 employees. Similar thresholds appear in many other statutes, such as the German Works Constitution Act (e.g., §§ 1 para. 1, § 9, § 38, § 95 para. 2, § 99 para. 1, § 106 para. 1 and § 111), German Act on Part-Time Employment and Temporary Employment (§ 8 para. 7), Federal Act on Parental Assistance and Parental Leave (§ 15 para. 7), and even the Federal Data Protection Act (§ 4f). Such thresholds in each case require the employer to accurately determine the number of employees working for the operation or company, which in close cases can be quite difficult. One question, for example, that arises all the time is whether temporary employees are counted to determine the size of the workforce. On October 18, 2011, the Federal Labor Court last had the opportunity to address this issue in connection with § 111 of the Works Constitution Act, according to which an employer is required to consult the works council with respect to an implementation agreement for operational changes of the company, if the workforce generally includes more than 20 employees with voting rights. If the employer fails to do so he runs the risk that employees will bring claims under § 113 of the Works Constitution Act seeking compensation for disadvantages associated with the operational changes.
Facts and Procedural History **Labor Court of Hagen, Decision of December 9, 2009 – case no.: 3 Ca 1523/09** **Regional Labor Court of Hamm, Decision of March 31, 2010 – case no. 3 Sa 53/10**	The plaintiff had worked for the defendant as an assistant flooring installer since November 2000. The defendant generally had 20 employees of its own, and, since November 2008, one temporary employee. In May 2009, the defendant terminated the employment of the plaintiff and ten other employees for operational reasons, without first negotiating an implementation agreement with the works council. The plaintiff made two claims before the Labor Court of Hagen: first, that the notice of termination was invalid because the defendant had failed to provide notice of mass layoffs, and, second, that the defendant was liable for compensation of disadvantages associated with the layoffs because it had made no attempt to negotiate an implementation agreement for the operational change (§ 111 of the Works Constitution Act). The employer took the position that § 111 of the Works Constitution Act was inapplicable, arguing that the temporary employee did not count and that the threshold of more than 20 employees provided for in § 111 therefore had not been reached. The Labor Court denied the wrongful termination claim, reasoning that no notice of mass layoffs in accordance with § 17 of the Wrongful Termination Act was required because only 20 of the employer's (own) employees within the meaning of § 17 of the Wrongful Termination Act worked for the operation and that the relevant threshold for notice of mass layoffs therefore had not been reached. However, the Labor Court ruled in plaintiff's favor on the claim for compensation of disadvantages. The court reasoned that the temporary employee did count for purposes of determining the number of employees within the meaning of § 111 of the Works Constitution Act, concluding that the company did have more than 20 employees with voting rights within the meaning of § 111 and thus should have made an attempt to negotiate an implementation agreement. The court's rationale was that § 111 makes reference to employees "with voting rights" and that under § 7 of the Act temporary employees have the right to vote in elections of the temporary employer's works council, if they are employed there for more than three months.

	On appeal, the complaint was denied on all counts by a decision of the Regional Labor Court of Hamm dated March 31, 2010. The Regional Labor Court denied the Plaintiff's claims for compensation, arguing that the temporary employee did not count because he was not an employee of the operation within the meaning of § 111 of the Works Constitution Act. Therefore, the court concluded, the threshold of § 111 had not been reached and, consequently, the employer also had no obligation to negotiate an implementation agreement and the plaintiff could have no claims for compensation of losses on the basis of the breach of such an obligation. In support of its ruling, the Regional Court cited two old decisions of the Federal Labor Court, in which the Federal Labor Court had held with respect to the provision of § 9 of the Works Constitution Act, which makes the number of members to be elected to the works council dependent upon the number of employees working in the operation, that temporary employees do not count toward the threshold (decisions of the Federal Labor Court dated April 16, 2003 – 7 ABR 53/02 and dated March 10, 2004 - 7 ABR 49/03).
Federal Labor Court, Decision of October 18, 2011 – case no. 1 AZR 335/10 **(press release)**	The plaintiff then successfully appealed from the decision of the Regional Labor Court to the Federal Labor Court. In a decision dated October 18, 2011, for which only a press release has been published so far, the Federal Labor Court held that temporary employees who work for a temporary employer for more than three months do count for purposes of determining whether the threshold of § 111 of the Works Constitution Act has been reached, even though they have no employment agreements with the temporary employer.
Practical Significance of the Decision	The decision of the Federal Labor Court on the issue of thresholds once again highlights that great care must be exercised when determining the number of employees for purposes of different German laws, in order to avoid potential pitfalls. The above example also illustrates that the number of employees as determined in accordance with one law may be different from the number of employees as determined in accordance with another law, depending on the wording, intent and purpose of each law. In this specific case, for example, the Labor Court ultimately found that there were (only) 20 employees within the meaning of § 17 of the Wrongful Termination Act, but 21 employees within the meaning of § 111 of the Works Constitution Act! The method of counting therefore may vary from one area of labor and employment law to another. The decision of the Federal Labor Court that temporary employees count towards the threshold of § 111 of Works Constitution Act also raises the question of whether the Federal Labor Court will in the future reach the same conclusion with respect to other thresholds defined in the Works Constitution Act. It remains to be seen whether the Court will depart from its prior, opposite decisions on § 9 of the Works Constitution Act, which appears quite possible. The Federal Labor Court's statement in support of its decision in the above case, which is expected to be released soon, may already provide some indication along those lines. For companies, these issues will gain practical significance at the latest when it is time for the next election of the works council. Above all, the question will arise how many members must be elected to the works council and placed on leave in accordance with § 38 of the Works Constitution Act. Both will depend on the number of the operation's employees and in which of the categories defined in § 9 and § 38 of the Works Constitution Act the operation falls. In addition, § 38 of the Works Constitution Act may require that the number of employees placed on leave be increased already during the current term of a previously elected works council. As a result, temporary employees may quite possibly "tip the scales" here.
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